Supreme Court, U.S.
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90-865

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

INDEPENDENT SCHOOL DISTRICT
NO. I-3, NOBLE COUNTY, OKLAHOMA,
et. al.,

Petitioners,

v.

JOHNNY LEE RANKIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Stephen Jones
of
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November 15, 1990

QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit erred in declaring unconstitutional on its face a state statute that provides more due process than is required by the 14th Amendment for a tenured teacher where the statute required the teacher to pay half the nominal cost of the hearing, regardless of a showing of need.

LIST OF PARTIES

The parties to the proceeding below included the Petitioners, Independent School District No. I-3, Noble County, Oklahoma; Bob J. Piguet, individually and in his official capacity of Superintendent of Independent School District No. I-3, Noble County, Oklahoma; Donald J. Green, Byron A. Phipps, Kenneth D. Caswell, each of them, individually and in their official capacities as members of the Board of Education of Independent School District No. I-3, Noble County, Oklahoma; Donald W. Doyle and Edward Roberson, in their official capacities only as members of the Board of Education of Independent School District No. I-3, Noble County, Oklahoma. The Respondent was Johnny Lee Rankin and he remains the Respondent before this Court.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on June 2, 1989 overruling (two to one) the United States District Court for the Western District of Oklahoma, and holding that a state statute was unconstitutional on its face because it violates the 14th

Amendment of the United States Constitution. The denial of petitioners' motion for rehearing occurred on July 11, 1990.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit is reported at 876 F.2d 838, and is reprinted in the Appendix hereto, page 1. The denial of petitioners' motion for rehearing is reprinted in the Appendix hereto, page 63.

The decisions of the United States District Court for the Western District of Oklahoma (Alley, W.E.) have not been reported. They are reprinted in the Appendix hereto, page 66.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and

1343, the Respondent brought this suit in the Western District of Oklahoma. On March 25, 1987, the Western District ruled that the Petitioners had not deprived Respondent of either a liberty or property interest without due process of law, and on April 22, 1987, the Western District directed a verdict at jury trial in favor of Petitioners on the First Amendment issue. Appendix, page 66-77.

Respondent Rankin appealed. On June 2, 1989, the United States Court of Appeals for the Tenth Circuit entered a Judgment and an Opinion declaring 70 Okla. Stat. § 6-103.10 unconstitutional on its face, reversing the trial court's directed verdict, and, directed that the case be reversed and remanded for further proceedings. Appendix, page 1. A Petition for Rehearing was sought and denied on July 11, 1990. Appendix, page 63.

On September 24, 1990, Justice White ordered the time for filing this Petition for Writ of Certiorari be extended to and including November 15, 1990.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

70 Okla. Stat. § 6-102.1 **Definitions.**

As used in this act:

. . .

2. "Dismissal" or "termination" means the discontinuance of a teacher's teaching service during the term of a written teaching contract, as provided by law;

3. "Non-reemployment" means the non-renewal of a teacher's contract under which he or she was teaching upon expiration of the contract;

4. "Probationery teacher" or "nontenured teacher" means a duly certified or licensed teacher who has completed less than three (3) consecutive complete school years of teaching service in one school district under a written teaching contract, as provided by law;

. . .

6. "Tenured teacher" or "postprobationary teacher" means a duly certified teacher who has completed three (3) or more consecutive complete school years of teaching service in one school district under a written teaching contract, as provided by law. Provided, however, that a school district employing a teacher who has previously held tenure within the state may grant tenure to said teacher upon renewal of said teacher's contract for the second year in the district.

70 Okla. Stat. § 6-103.4 **Dismissal or non-reemployment of teacher--Procedure.**

A. Whenever a superintendent of a school district determines that cause exists for the dismissal or non-reemployment of a teacher employed within the school district, he or she shall submit a recommendation in writing to the board of education for such school district. In the case of a tenured teacher, the recommendation shall contain the one or more statutory grounds for the potential dismissal or non-reemployment. The recommendation for the dismissal or non-reemployment of either a tenured or a probationary teacher shall be approved or rejected upon a majority vote of the board's members.

B. If the local board of education approves the recommendation of the superintendent, or determines on its own volition that a teacher should be dismissed or non-reemployed, the board shall cause written notice of the dismissal or non-

reemployment to be mailed by certified mail, restricted delivery, with return receipt requested, to the teacher who is the subject of the action. In the case of a tenured teacher, the notice shall state the one or more statutory grounds for the dismissal or non-reemployment and the right of the teacher to have a hearing conducted by a hearing panel. In the case of a probationary teacher whose contract is not being renewed, the notice shall state the cause for non-renewal and the right of the teacher to have a due process hearing conducted by the board of education. Pending final determination of a tenured or probationary teacher's dismissal or non-reemployment, the local board may have the teacher suspended if the board determines that the best interests and welfare of the students in the school district require such action. Such suspension shall not deprive the teacher of any compensation or

other teaching benefits to which he or she would otherwise be entitled by law or pursuant to his or her teaching contract.

C. Within ten (10) days of receipt of the notice, the tenured or probationary teacher shall notify by certified mail, restricted delivery with return receipt requested, the clerk of the local board of education of his or her respective decision.

D. If a tenured teacher fails to notify the clerk of the local board of education within the ten-day period of his or her desire to have a hearing on his or her dismissal or non-reemployment conducted by a hearing panel, the teacher shall be deemed to have waived his or her right to a hearing and the initial determination of his or her dismissal or non-reemployment by the board of education shall become final and nonappealable. If, within the ten-day period, the tenured teacher notifies the

clerk of the local school board of his or her desire for a hearing conducted by a hearing panel, the clerk shall, not later than the end of said period of time, notify the State Superintendent of Public Instruction of such request.

E. If a probationary teacher fails to notify the clerk within the ten-day period of his or her desire to have a due process hearing on his or her dismissal or non-reemployment conducted by the local board of education, the teacher shall be deemed to have waived his or her right to the hearing and the initial determination of his or her dismissal or non-reemployment by the board of education shall become final and nonappealable. If, within the ten-day period, the probationary teacher notifies the clerk of the board of education of his or her desire to have a due process hearing on his or her dismissal or non-reemployment conducted by such

board, the board shall, as soon as possible, hold a hearing. At the hearing the probationary teacher shall be afforded all such procedural due process rights as are guaranteed by the Oklahoma and United States Constitutions. At the conclusion of the hearing, the local board of education shall render a final and nonappealable decision on the question of the probationary teacher's dismissal or non-reemployment.

70 Okla. Stat. § 6-103.10

Compensation of hearing panel--Costs

A. The members of the hearing panel shall be compensated for serving in such capacity in an amount to be determined in advance by the adoption of appropriate rules and regulations by the State Board of Education.

B. The local board of education and the tenured teacher shall each be responsible for fifty percent (50%) of the

expenses and cost of the hearing and the official transcript, excluding attorney's fees of the parties involved.

STATEMENT OF THE CASE

Johnny Lee Rankin (Rankin) was employed by Independent School District No. I-3, Noble County, Oklahoma (Red Rock School District) as a vocational-agriculture teacher. Although the Superintendent of the District, Dr. Bob Piguet, repeatedly recommended to the Board of Education that Rankin's contract not be renewed, the Board members continued to renew his contract for three (3) consecutive years. Tr. 61, 64, 66, 68, 69, 72-74. However, after the end of his second year of employment, the Board had a discussion with Rankin concerning his attitude, cooperation and participation in the school system. Tr. 73-74. Under

Oklahoma law, Rankin was considered a tenured teacher after he began his fourth year of employment at Red Rock in 1984. 70 Okla. Stat. § 6-102.1(6). Tr. 68.

On March 4, 1985, Piguet once again recommended to the Board of Education that Rankin's contract not be renewed for the following school year. In support of his recommendation, Piguet sat out a series of specific charges which constituted in his opinion, "immorality" and "neglect of duty". Tr. 201, 209. At its March 4, 1985 meeting, the Board spent several hours discussing Rankin. Tr. 227. At that meeting a motion was made by Board member, Donald Doyle, to re-hire Rankin; that motion was defeated three to two with Board members, Kenneth Caswell, Donald Green and Byron Phipps voting against the motion, and Doyle and Edward Roberson voting for it. Tr. 24. The Board then approved a motion giving Rankin a chance to resign. Tr. 394.

Following that meeting, Piguet informed Rankin that the Board had voted not to renew his contract, gave him a copy of the charges, explained the charges to him, and told him the Board was giving him the opportunity to resign his position. Tr. 84-85, 124.

Rankin did not resign, and at the Board's April 1, 1985 meeting, the Board formally adopted "immorality" and "neglect of duty" as the grounds for non-renewing his contract. Tr. 25-26, 85. Rankin was present at that meeting, accompanied by his attorney, but made no effort to address the Board or to object to the formal adoption of the grounds for his non-renewal. Tr. 85-86. Following the April meeting, Piguet sent Rankin written notice of the Board's decision not to renew his contract, the reasons behind that decision, and informed him of his right to a hearing conducted by a hearing panel. Tr. 51.

Under Oklahoma law, tenured teachers are entitled to a hearing conducted by a panel. The hearing panel consists of a hearing judge selected from a list of not less than 200 Oklahoma attorneys with trial experience pursuant to a procedure outlined in 70 Okla. Stat. § 6-103.5 and two other persons, one designated by the local Board of Education and the other designated by the tenured teacher. 70 Okla. Stat. §§ 6-103.4, 6-103.5, and 6-103.6. Oklahoma law provided that the local Board of Education and the tenured teacher would be responsible for fifty percent (50%) of the expenses and costs of the hearing and the official transcript, excluding attorney fees. 70 Okla. Stat. § 6-103.10. Oklahoma law also provided, to probationary or non-tenured teachers an alternative procedure for a due process hearing before the local Board of Education with all procedural due process rights guaranteed. This due

process hearing is provided without cost to the teacher. 70 Okla. Stat. § 6-103.4(E).

Rankin responded to the written notice from Dr. Piguet with a letter to the Clerk of the Board of Education, dated April 8, 1985, in which he requested a hearing before a hearing panel pursuant to 70 Okla. Stat. § 6-103.4. Tr. 90. That letter is devoid of any reference to Rankin's ability or inability to bear his portion of the costs associated with such a hearing and did not request a waiver of those costs. Tr. 51. The hearing Rankin originally requested would have proceeded pursuant to the statutory provisions outlined in 70 Okla. Stat. § 6-103.7. However, after making his initial request for a hearing, Rankin chose not to pursue it. Tr. 90. Rankin understood that if he had followed the procedure outlined by the statute, a decision would have been made concerning his appointment prior to the time his

contract expired. Tr. 90. Under Oklahoma law, Rankin's decision not to pursue any of the procedures provided by 70 Okla. Stat. § 6-103.4 acted as a waiver of his right to any such hearing. 70 Okla. Stat. § 6-103.4(D). Rather than request either one of the hearings provided by § 6-103.4 or request a waiver or the costs involved, Rankin chose to bring an action in federal court. Tr. 31.

During Rankin's last year of employment at Red Rock, he was paid approximately $26,500.00. Tr. 42. Rankin's contract with the school district ended on June 30, 1985.

The petitioners filed a joint motion for summary judgment. The trial court in ruling on that motion found that the defendants had not deprived Rankin of either a liberty or property interest without due process of law, nor had they conspired to deprive Rankin of his

constitutional rights, and the due process procedure provided by Oklahoma law to Rankin was not unconstitutional either on its face or as it applied to him. Appendix, page 69. The trial court then ordered a trial to be held on the issue of whether the defendants had deprived Rankin of his First Amendment right to freedom of speech on March 24, 1987. Appendix, page 69.

At trial, Rankin asserted that he was discharged by the defendants in retaliation for exercising his right under the First Amendment to speak on matters of public concern. At the conclusion of Rankin's case in chief on April 22, 1987, the trial court sustained defendants' motion for directed verdict, finding that the record did not contain any evidence of any protected speech by Rankin. Appendix, page 73.

On June 2, 1989, the Tenth Circuit rendered its Opinion that 70 Okla. Stat. § 6-103.10 was unconstitutional on its face because it impermissibly burdened procedural due process by requiring teachers to be responsible for fifty percent of the expenses and costs of the due process hearing. Appendix, page 14-15. On July 11, 1990, a motion for re-hearing was denied by the Tenth Circuit. Appendix, page 63.

REASONS FOR GRANTING THE WRIT

I. The decision of the Tenth Circuit, if allowed to stand, marks a significant expansion of the due process clause of the Fourteenth Amendment and elevates the protection of property and liberty interests to a fundamental right on par with

> marriage, interstate travel and equality of the races and imposes significant additional financial burdens on states by removing the requirement that a tenured teacher with a salary of $26,000 pay fifty percent of the cost and expenses (excluding attorney fees) of a hearing.

This decision by a divided panel of the Tenth Circuit Court of Appeals elevates protection of property and liberty interests protected by the due process clause of the 14th Amendment to a fundamental right on par with marriage, interstate travel and equality of the races. The statute in question gave Rankin a property interest in continued employment. 70 Okla. Stat. § 6-102.1(6). It also set out the statutory grounds upon which his employment could be terminated or

his contract nonrenewed. It provided an opportunity to be heard in a meaningful time and a meaningful manner by providing notice and a hearing before an impartial hearing panel of which he was free to pick one of three panelists. The statute provided that the hearing would be held prior to his contract's expiration date and it gave Rankin the right to appeal.

The Tenth Circuit struck this statutory procedure down on its face only because it included a cost-sharing provision. 70 Okla. Stat. § 6-103.10 It absolved Rankin, who made no showing of his inability to pay, from the consequences of his waiver under 70 Okla. Stat. § 6-103.4(D). Applying strict scrutiny to the statute, the Circuit found that it impermissibly burdened Rankin's right to due process. Appendix, page 14.

In light of the nature of the Circuit's analysis, the impact of this case

will affect many statutes in areas far field from the employment context. By equating property and liberty interests with fundamental interests such as family and equality of the races, the Tenth Circuit has expanded the protections of the Fourteenth Amendment while restricting government's ability to pay for said protections. Such expansion is better reserved for Congress or this Court.

II. The Court should exercise its supervisory power over the Circuit by accepting certiorari in light of the effect this case will have on a wide body of settled case law.

If this decision is correct, a multitude of case law will need to be revisited. Statutes rendered constitutional by an analysis less than

strict scrutiny need to be retested. For example, if a teacher's right to continued employment equates with equality of the races, which Petitioners submit that it does not, shouldn't equality of the sexes be similarly elevated. If this case is allowed to stand, it can be applied across the nation, not just in Oklahoma, Kansas, New Mexico, Wyoming, Colorado, and Utah.

Clearly, the review of this case would not be an academic and esoteric enterprise. The decision departs from the direction and tenor of this Court's recent rulings as a whole. Lives may not stand in the balance but the budgets of states, municipalities, and agencies stand in the balance. While the Tenth Circuit dismissed out of hand such cost-sharing concerns[1], Petitioners respectfully assert that the American taxpayer cannot nor has this Court in the past dismissed such concerns out of hand.

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[1]Appendix, page 12.

See, Matthews v. Eldridge, 424 U.S. 319, 348, 47 L. Ed.2d 18, 99 S. Ct. 1062 (1978), where this Court stated "the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed." Due process does not require the state to pay 100 percent of the cost and expenses of a termination hearing when the costs are nominal and the teacher has made no showing of financial need or indigency and in fact earned $26,000 on a nine-month contract, and the procedure of notice and hearing greatly exceeded the due process requirements of the Fourteenth Amendment. The Petitioners submit that this is a case where the Court should exert its supervisory powers over a Circuit and provide guidance to state legislators, litigants, and courts alike on the standard to be used in weighing the constitutionally of process given.

III. This decision, which equates a teacher's due process protections with fundamental rights such as equality of the races, and applies strict scrutiny where this Court has applied the rational basis in the past, is in conflict with this Court's precedent.

This decision by the Tenth Circuit equates a tenured teacher's due process interest in not sharing the nominal cost of a hearing with the right of an indigent to be relieved of paying court costs to file a divorce. Appendix, page 11. This holding is clearly in conflict with Supreme Court precedent.

In a per curiam decision, this Court once again distinguished the nature of property and liberty interest under the 14th Amendment with those fundamental

rights such as procreation, marriage and family life. Harrah Independent School District v. Martin, 440 U.S. 194, 198, 59 L. Ed.2d 248, 99 S. Ct. 1062 (1979). Indeed, Martin involved a different version but the same statutory framework involved in this case. In Martin, this Court reviewed the Oklahoma statutory scheme using the rational basis standard. In so doing, this Court held:

> [t]he School Board's rule is endowed with a presumption of legislative validity, and the burden is on respondent to show that there is no rational connection between the Board's action and the School District's conceded interest in providing its students with competent, well-trained teachers.

440 U.S. at 198.

The Tenth Circuit rejected this precedent and this was error. The Circuit failed to apply the rational basis test in favor of a strict scrutiny analysis. As support of this holding, the Circuit cites Meyer v. Grant, 497 U.S. 414, 434, 100 L.

Ed.2d 425, 108 S. Ct. 1886 (1988) (strict scrutiny of state burdening plaintiff's First Amendment rights) and Smith v. Paulk, 705 F.2d 1279, 1284 (10th Cir. 1983) (strict scrutiny of statute penalizing plaintiff's exercise of constitutional right to interstate travel). Appendix, page 7. Although these two cases can clearly be distinguished since they both involve fundamental rights at their core, the Tenth Circuit found "[a] tenured teacher's right to procedural due process protection of his liberty and property rights in his employment is as constitutionally substantive as the right to divorce." Appendix, page 11.

It is beyond dispute that under Oklahoma law, Rankin has as a tenured teacher has a property interest in his employment. A property interest is not a fundamental constitutional right but a contract right created by state statute.

As such, the constitutionality of the due process provided for by the statute should be reviewed to determine whether it satisfies due process using the rational basis analysis.

Instead, the Tenth Circuit specifically found that the cost-sharing provision of the statute was unconstitutional because it impermissibly burdened procedural due process. In support of this finding, the Circuit cited Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed.2d 113, 91 S. Ct. 780 (1971).

This Court in Boddie held that mandatory court fees and costs imposed a significant burden on the ability of those unable to pay to obtain a divorce and ruled that the statute involved was unconstitutional as related to those plaintiffs before the court. This Court refused to rendered that statute unconstitutional on its face and limited

its ruling to the appellants before it by stating that its holding went "no further than necessary to depose of the case before us, a case where the bonafides of both appellants' indigency and desire for divorce are beyond dispute." 401 U.S. at 382. This Court did not relieve non-indigents from paying court costs in Boddie.

Rankin's inability to pay has not been established. Rankin did not inform the Board of his inability to pay until after he filed his federal lawsuit. Rankin was paid over $26,000.00 for nine months of work while working at Red Rock School District. The cost-sharing statute would require payment of half the cost that was estimated at trial to be about no more than $350. Appendix, page 6. Much of this evidence was elicited after the trial court ruled on this issue at the summary judgment level. Accordingly, the Circuit should not

have considered it in determining whether the trial court's ruling was correct.

In Boddie the plaintiffs informed the Clerk of Court of their indigency, but no waiver of the fees and costs was allowed. There is no proof Rankin or any tenured teacher in Oklahoma would be found unable to pay the modest expenses and costs involved and Red Rock School District was given no such opportunity to waive the costs involved. Absent a showing that the District was put on notice of Rankin's inability to pay, this Court should hold that any procedural defects in Oklahoma's statute are waived.

Most importantly, this Court in Boddie, as it did in Martin, recognized the distinction between fundamental rights and other interests.

> Given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant statement monopolization of the means for legally dissolving this

> relationship, due process does prohibit a state from denying, slowly because of inability to pay, access to its courts to individuals to seek judicial dissolvement of their marriage.

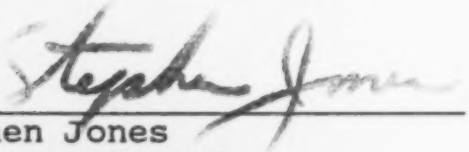
401 U.S. at 374. Indeed, this distinction has been upheld in further opinions concerning the burdening of procedural due process. See United States v. Kras, 409 U.S. 434, 34 L. Ed.2d 626, 93 S. Ct. 631 (1973) and Ortwein v. Schwab, 410 U.S. 656, 35 L. Ed.2d 572, 93 S. Ct. 1172 (1973). Both cases involved important interests but not a fundamental interest such as equality of the races. Both cases apply the rational basis test rather than strict scrutiny. Kras, 409 U.S. at 447-8, and Ortwein, 410 U.S. at 660.

This Court should grant petitioners writ of certiorari on the basis that the Tenth Circuit opinion is in clear conflict with Supreme Court precedent found in Martin, Boddie, Kras, and Ortwein.

CONCLUSION

In summary, the Tenth Circuit equated a tenured teacher's liberty and property rights in continued employment to fundamental rights such as equality of the races. In so doing, the Circuit applied strict scrutiny rather than the rational basis test to its analysis of the Oklahoma statute at issue in this case. This is in conflict with Supreme Court precedent, and if the case stands, will cause a great many statutes to be reviewed and settled civil rights law to become unsettled. Such a dramatic shift requires this Court's review before it is applied elsewhere. Accordingly, the petitioners respectfully urge this Court to accept certiorari in this case.

Respectfully submitted,



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